

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA**

In re

**VICTOR N. BUNITSKY, JR., and  
DIANA BUNITSKY,**

Debtors.

Case No. **05-64866-7**

**LYNN SMITH,**

Plaintiff.

-vs-

**VICTOR N. BUNITSKY, JR.,**

Defendant.

Adv No. **06-00046**

**O R D E R**

At Butte in said District this 23<sup>rd</sup> day of January, 2007.

In this adversary proceeding Plaintiff Lynn Smith (“Smith”) seeks exception from the discharge of her former spouse, Defendant/Debtor Victor N. Bunitsky, Jr. (“Bunitsky”), for her claim under 11 U.S.C. § 523(a)(5) as alimony, maintenance or support in connection with their divorce decree, separation agreement and settlement, plus attorney’s fees and costs. After due notice trial of this cause was held at Missoula after due notice on October 5, 2006. The Plaintiff appeared and testified, represented by attorney Nikolaos G. Geranios (“Geranios”) of Missoula, Montana. The Defendant appeared and testified, represented by attorney Edward A. Murphy

(“Murphy”) of Missoula, Montana. All of the parties’ exhibits were admitted into evidence by stipulation, including Plaintiff’s Exhibits (“Ex.”) A, B, C, D, E and Defendant’s Ex. A, B, C, D, and E.<sup>1</sup> At the conclusion of the parties’ cases-in-chief the Court granted the parties time to file briefs, which have been submitted and reviewed by the Court together with the record and applicable law. This matter is ready for decision.

The parties agree this Court has jurisdiction of this adversary proceeding under 11 U.S.C. § 1334. This is a core proceeding to determine dischargeability of a debt under 28 U.S.C. § 157(b)(2)(I). At issue is whether Smith’s claim against Bunitsky arising from their divorce is in the nature of alimony, maintenance or support subject to exception from Bunitsky’s discharge under 11 U.S.C. § 523(a)(5), or whether the claim was satisfied or discharged. For the reasons set forth below Judgment will be entered against Bunitsky excepting Smith’s claim from the Defendant’s discharge under § 523(a)(5), and awarding Smith her attorney’s fees and costs. This Memorandum of Decision includes the Court’s findings of fact and conclusions of law pursuant to F.R.B.P. 7052 (incorporating Fed. R. Civ. P. 52 in adversary proceedings).

### **PROCEDURAL HISTORY**

The above-captioned Chapter 7 bankruptcy case commenced when Debtors Victor Bunitsky and Diana Bunitsky filed on October 14, 2005, Schedules and Statements listing personal property worth \$25,341.38 and liabilities in the amount of \$357,893.44. Schedule F lists the Smith as a creditor holding an unsecured claim dated 08/01/1996 in the amount of

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<sup>1</sup>Ex. A and B offered by both parties are identical and consist of their Decree of Divorce dated September 6, 1990 (Ex. A), and the Separation and Property Settlement Agreement between the parties dated August 31, 1990 (Ex. B). The parties’ other exhibits do not correspond.

\$35,000.00 which is not marked as contingent, unliquidated or disputed, and is described as “Ex-spouse (Judgment”). Schedule J lists \$300 in alimony, maintenance or support paid to others each month. Debtors filed their voluntary Chapter 7 petition on November 9, 2005, listing no prior bankruptcy cases filed within the last 6 years. Debtors were represented by attorney Stephen A. Meikle until February 15, 2006, when he moved for and was granted leave to withdraw.

The Plaintiff commenced the instant adversary proceeding by filing her complaint on April 3, 2006<sup>2</sup>, seeking exception from her former spouse Bunitsky’s discharge her claim for alimony, maintenance and support under 11 U.S.C. § 523(a)(5) and, alternatively, under § 523(a)(15)<sup>3</sup>. A Discharge of the Debtors was entered on April 5, 2006, in the main case.

Plaintiff moved for summary judgment in this adversary proceeding, which was denied by Memorandum and Order entered on October 4, 2006, in which the Court concluded that a factual inquiry was required into what the parties intended in the Decree of Divorce, Separation and Property Settlement Agreement and 1994 stipulation and order. A Pretrial Order was submitted on September 29, 2006, and approved by Order entered on October 3, 2006, which states that it shall supplement all pleadings.

### **FACTS**

The pretrial order set forth the following agreed facts:

1. Plaintiff is the ex-spouse of the Defendant/Debtor Bunitsky. On or about September

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<sup>2</sup>Smith had requested and been granted an extension of time to file a § 523 action.

<sup>3</sup>Smith’s alternative claim based on § 523(a)(15) was not included in the proposed pretrial order submitted to the Court and approved. Thus, Plaintiff’s § 523(a)(15) claim is deemed abandoned and superseded by the approved Pretrial Order.

6, 1990, the district court for Clark County, Nevada, entered a Decree of Divorce (“Decree”) in the divorce case of Bunitsky and Smith in which, among other things, the Separation of Property Settlement Agreement (“Agreement”) entered into by and between the Debtor and Smith on or about the 31<sup>st</sup> day of August, 1990, was approved and ratified.

2. The Agreement required Bunitsky to pay to Smith alimony and certain sums and to hold Smith harmless from certain debts and obligations. A true and correct copy of the Decree is annexed to the Complaint marked as Ex. A and incorporated by reference, as though fully set forth herein. A true and correct copy of the court approved and ratified Agreement is annexed to the Complaint as Ex. B and incorporated by reference, as though fully set forth herein.

Defendant is attempting to discharge this obligation through this bankruptcy proceeding.

Additional facts are derived from the parties’ testimony and exhibits. Smith testified that the parties were married from 1966 until 1990, and had three children together. She was employed at times during the marriage, but testified that she developed lupus and became disabled. At the time they divorced, Smith testified, she was earning \$638 per month in social security disability. Bunitsky obtained a law degree and is employed as an attorney<sup>4</sup>. Smith testified that in 1990 Bunitsky earned \$78,000.

Smith was not at first represented by counsel during their divorce, but later hired an attorney. She testified that Bunitsky represented himself and drafted the Agreement, Ex. B. Bunitsky testified under cross examination that Ex. B was drafted in his law office with his firm’s name and address printed in the margins. Section II of Ex. B at pages 2 and 3 is entitled

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<sup>4</sup>Bunitsky first passed the bar exam in Pennsylvania in 1978. Since November 2004 Bunitsky has been employed by the office of public defender in Missoula, Montana.

“Alimony” and provides that “HUSBAND agrees to pay, and WIFE agrees to accept, alimony in the amount set forth as follows”, followed by a schedule of weekly alimony payments for ten years beginning in year 1 in the amount of \$150.00 per week and increasing to \$500.00 per week for years 7 through 10. Bunitsky testified that he and Smith met without attorneys to negotiate the amount, and that when he asked her what would happen if he was not making enough money to pay, she came up with the amounts on page 2. Before moving on to Section III, “Division of Community Property”, Section II of Ex. B continues:

A. It is agreed by the parties hereto that, in the event the WIFE shall remarry, alimony shall cease and desist beginning the month in which marriage takes place. However, HUSBAND agrees to assist WIFE in establishing an annuity for her retirement if she remarries prior to the termination of the alimony payments.

B. HUSBAND agrees to assist WIFE in obtaining her own automobile, up to a value of at least \$15,000.00, if the Jaguar is not kept by WIFE at the expiration of its lease. Both parties agree to be reasonable in this regard.

Smith testified that Bunitsky agreed to provide her with a car because she could not work, and that he also agreed to name her as beneficiary of his life insurance policy to ensure payment of her alimony if he died. Bunitsky testified that his alimony obligation was to terminate also in the event of Smith’s death, and that it was up to Smith to take the lead in establishing her retirement annuity.

Section XXI of the Agreement, Ex. B, provides for attorney fees and costs:

In any action or proceeding brought to enforce or interpret the provisions of this agreement, the prevailing party shall be entitled to recover all attorney fees and costs incurred by that party, whether or not the action or proceeding is prosecuted to judgment. This shall include attorney fees and costs incurred by a party defending a claim or suit necessitated by the other party’s failure to indemnify as required herein.

The state court approved Ex. B in the Decree of Divorce, Ex. A, entered in Case No. D129957 in the district court of Clark County, Nevada, on September 6, 1990, but Ex. B was not merged into the Decree. The divorce was not amicable, and Bunitsky testified that he has not spoken to Smith since 1990, stating “I hate her”<sup>5</sup>. Smith testified that Bunitsky made some sporadic alimony payments, but did not make all alimony payments required under Ex. B and A.

On July 2, 1991, Bunitsky filed a bankruptcy petition in Nevada, and Smith testified that she was served with notice of the case and hired an attorney to protect her claim<sup>6</sup>. Bunitsky testified that no one appeared at his 11 U.S.C. § 341(a) meeting of creditors. Smith testified that Bunitsky told her that her claim for alimony would not be discharged in his Nevada bankruptcy, and that he continued to make sporadic alimony payments to her during his 1991 bankruptcy and afterward. A discharge was entered in Bunitsky’s Nevada bankruptcy case. Smith did not initiate an adversary proceeding in Bunitsky’s 1991 bankruptcy seeking exception from his discharge. Bunitsky testified that he did not sign a reaffirmation agreement with Smith for the unpaid alimony.

Smith married Frederick L. Smith on October 19, 1991, and has lived with him ever since. Defendant’s Ex. C. They purchased a home in Las Vegas in 1997, and Bunitsky testified that they purchased several homes, including one in Summerland. Bunitsky testified that Smith

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<sup>5</sup>Bunitsky’s exhibits include his statements that Smith interfered in his relationship with their children, Ex. G to Plaintiff’s Ex. E, page 2, and he testified that she incurred credit card debts using his power of attorney which caused his bankruptcy. The Court sustained Smith’s objection to this line of inquiry, and Bunitsky’s attorney Murphy made an offer of proof which is part of the record.

<sup>6</sup>The record does not disclose whether Bunitsky was represented by an attorney in his bankruptcy. Although he is a licensed attorney Bunitsky testified that he does not know bankruptcy law.

lived with her new husband prior to marrying him, and that she inherited about \$12,000 after her father's death. Despite these changes, Bunitsky testified that there were no renegotiations of his alimony obligation after Smith's remarriage<sup>7</sup>.

Smith testified that she initiated litigation to enforce her rights under Ex. B because Bunitsky failed to pay her in compliance with the alimony provisions and other obligations required by Ex. B and A. She testified that she filed a complaint<sup>8</sup> and obtained a default of Bunitsky. Both parties testified that afterward Bunitsky came forward and negotiated Plaintiff's Ex. C, a "Stipulation and Order" signed by Bunitsky and Smith on June 10, 1994, and entered in Case No. A 319332 in the district court, Clark County, Nevada, on June 13, 1994.

Plaintiff's Ex. C provides at page 2 for judgment against Bunitsky in the amount of \$70,000.00 "as and for arrearages in alimony", payable in installments equal to 18% of his gross wages or income from law practice "or any other business, but, in any event, in a sum not less than" \$225 per month. Bunitsky also agreed again to maintain a \$100,000 life insurance policy with Smith as irrevocable beneficiary as long as any balance remains unpaid to Smith, and to award her 30% of any of his military retirement benefits, \$1,500<sup>9</sup> in Smith's attorney's fees in the underlying divorce action plus another \$3,000 for Smith's attorney's fees in the enforcement

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<sup>7</sup>Plaintiff's Ex. E includes Bunitsky's Opposition to Smith's motion for order to show cause filed February 23, 1996, in which Bunitsky's attorney states at page 2: "[B]ecause of Mr. Bunitsky's financial problems he made a mistake and simply ignored the decree. Had he brought a simple motion to reduce his obligation, he would not be in this mess."

<sup>8</sup>Defendant's Ex. D is Smith's complaint filed on March 14, 1993, in the district court, Clark County, Nevada, Case No. A319332.

<sup>9</sup>Smith gave Bunitsky credit for a total of \$150 in payments Bunitsky made against the \$1,500 in reaffirmed attorney's fees.

action. Next, Bunitsky agreed in Plaintiff's Ex. C, "as a form of additional spousal support", to indemnify and hold Smith harmless for the balance due to Marine Midland Automotive Financial Corporation in the approximate balance of \$7,375.00 as of February 12, 1994, plus payment of Smith's attorney's fees and costs related to that obligation. Finally, Plaintiff's Ex. C provides at paragraph 12 that "the prevailing party shall be entitled to a reasonable sum as and for attorney's fees incurred in connection therewith as well as all other relief granted or awarded in any suit or other proceeding", including consultation with legal counsel as well as formal action.

Both parties and their respective attorneys signed the Stipulation, and both sides' attorneys signed district court's order dated June 13, 1994, approving Plaintiff's Ex. C<sup>10</sup>. In Bunitsky's affidavit (Ex. G of Plaintiff's Ex. E), dated February 22, 1996, at paragraph 15 Bunitsky described Plaintiff's Ex. C as "an amicable past and future alimony pay-off":

At arms length, Lynn, her attorney, myself, and my attorney worked out an amicable past and future alimony pay-off which I have attempted to fulfill as quickly and thoroughly as possible. It even includes a life insurance provision so that if something happens to me, Lynn will receive the entire amount of the \$70,000.00 that I owe to her. What I vehemently object to is this Court assessing me any more attorney fees for compliance with these Orders.

Bunitsky testified that he did not prepare Plaintiff's Ex. C and that he entered into Plaintiff's Ex. C on the advice of his attorney because he wanted the dispute to end and out of his life, and because he was not in a position to fund further litigation. He further testified that he did not intend to waive the benefit of his bankruptcy discharge<sup>11</sup> by entering into Plaintiff's Ex. C, and that Smith was definitely capable of supporting herself at the time he signed Plaintiff's

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<sup>10</sup>The parties and their attorneys signed the agreement on June 10, 1994.

<sup>11</sup>Bunitsky admitted that he is not familiar with bankruptcy law.



Ex. C as shown by her new car and ownership of her home free and clear. Bunitsky testified that Plaintiff's Ex. C was not submitted to the bankruptcy court in his first bankruptcy case for approval.

Smith testified that she kept a record of Bunitsky's payments and that he paid her \$31,295.00, but that Bunitsky failed to pay her all he owed under Plaintiff's Ex. C. Plaintiff's Ex. E includes correspondence between the parties' attorneys in 1995 regarding Bunitsky's failure to pay.

On February 23, 1996, Smith filed a motion in the district court, Clark County, Nevada, for order to show cause why Bunitsky should not be held in contempt. Plaintiff's Ex. E. Bunitsky's attorney filed an Opposition admitting at page 2 that he "simply ignored the decree" requiring him to pay monthly spousal support, but explaining that he did not have sufficient income to meet the obligation, as shown by his financial statements. Plaintiff's Ex. E.

Smith testified that Bunitsky continued making consistent alimony payments to her, with some payments missed, from 1996 until 2005, in the total amount of \$31,295, and that he never disputed that he owed her alimony during that period or asserted that the alimony was discharged. But he stopped making the alimony payments in November 2005, and Smith testified that Bunitsky's answer was the first indication Smith had of Bunitsky's claim that he paid her what he owed<sup>12</sup>.

Smith did not agree with the amount of her claim listed on Schedule F as \$35,000, but testified that it was close to the amount of alimony Bunitsky owes her after crediting him with

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<sup>12</sup>Bunitsky's answer at page 4 alleges the debt paid as a result of his payment of undisclosed credit card debt.

\$31,295 of the \$70,000 owed. She testified that the \$300 per month alimony listed on Schedule F is the amount she was receiving from Bunitsky. Bunitsky testified that he listed Smith's claim on Schedule F and the monthly alimony obligation on Schedule J on advice of his attorney.

Bunitsky admitted knowing that his Schedules are sworn documents.

After the hearing both parties filed affidavits of attorney's fees and costs they incurred during this adversary proceeding, as provided for in Plaintiff's Ex. C, page 5, paragraph 12. Smith's attorney Geranios' affidavit (Docket No. 33) includes a billing statement itemizing his attorney fees totaling \$7,307.50 and costs in the amount of \$416.78. Bunitsky's attorney Murphy's affidavit (Docket No. 34) includes a billing statement itemizing his attorney fees totaling \$3,712.51. The Court has reviewed both affidavits and billing statements. The Court finds that Geranios' attorney fees and costs are reasonable and supported by adequate documentation. Based upon the discussion that follows, the Court does not award attorneys fees to either party for the reasons stated.

## **DISCUSSION**

### **I. Contentions of the Parties.**

Plaintiff contends that her claim is for alimony, maintenance, or support, and that the parties' intent is explicitly reflected in the Agreement, Ex. B, and Plaintiff's Ex. C, and therefore should be excepted from Bunitsky's discharge under § 523(a)(5). Plaintiff lists factors supporting a finding of alimony, maintenance or support including the evidence of the length of the alimony payments, the fact that 2 of their children resided with her at the time of the divorce, her disability and the parties' imbalance of income, and the parties' agreement for Bunitsky to continue making alimony payments after his first bankruptcy case, Plaintiff's Ex. C. Plaintiff

argues that Bunitsky's testimony denying that he owes her alimony lacks credibility, is contradicted by his statements in Ex. B, Plaintiff's Ex. C as well as his subsequent alimony payments, and that he should be judicially estopped from recharacterizing his obligations as other than alimony, maintenance or support or that the alimony obligations terminated upon her remarriage. Smith requests exception from Bunitsky's discharge of the sum of \$38,705.00<sup>13</sup> under § 523(a)(5), plus her attorney fees and costs as prevailing party based upon the attorney fee provision of Plaintiff's Ex. C.

Bunitsky contends that the remaining contractual obligations he owed to Smith are not spousal support, and were discharged in his 1991 bankruptcy. He argues that Smith remarried thereby terminating her need for spousal support, that she did not bring an adversary proceeding in his 1991 bankruptcy which Bunitsky had to file to address credit card debt incurred in his name by Smith, and that he did not reaffirm the debt to Smith in his 1991 bankruptcy so her claim was discharged and the 1993 settlement agreement is void as a violation of the discharge injunction entered in 1991. Bunitsky argues that he agreed to enter in to Plaintiff's Ex. C because he did not have the finances to fund a defense and does not practice bankruptcy law. Bunitsky admits that he continued to pay Smith until he filed the instant case, but notwithstanding later argues that he fulfilled his spousal support obligation. Bunitsky opposes application of judicial estoppel because there was no trial in Smith's 1993 action to enforce the divorce Agreement. He requests judgment in his favor that he has fulfilled his support obligation that arose from their marriage.

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<sup>13</sup>The \$38,705 is the amount of the \$70,000 from Plaintiff's Ex. C deemed alimony after crediting Bunitsky with \$31,295 in payments.

## II. § 523(a)(5).

The Court first takes up Bunitsky's contention that Smith's claim for alimony was discharged in his 1991 bankruptcy, and that his subsequent agreement to pay \$70,000 as alimony was void as a violation of the discharge injunction. This argument puts the cart before the horse, because § 523(a) begins by stating plainly that a "discharge under section 727 . . . does not discharge an individual from any debt ...." § 523(a). Section 523(a)(5) then follows among a list of debts which are not discharged.

Certain debts listed in § 523(a) are discharged unless a creditor requests such debt be excepted from discharge, as provided in pertinent part under § 523(c)(1):

Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to show such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

A leading commentator explains that if a creditor who is owed a debt that may be excepted under the subsections listed in § 523(c)(1) does not act, the debt is discharged. 4 COLLIER ON BANKRUPTCY, ¶ 523.26[1] (15<sup>th</sup> 1995).

The language of § 523(c)(1) plainly does not include subsection 523(a)(5) among the subsections of debts which are discharged unless the creditor requests a determination. When the language of a statute is plain, the sole function of the courts is to enforce it according to its terms unless the disposition required by the text is absurd. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (quoting *United States v. Ron*

*Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917))).

“Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S.Ct. 2035, 2040, 124 L.Ed.2d 118 (1993) (internal quotation marks and alterations omitted).

If Congress wished to include subsection 523(a)(5) among the debts excepted under § 523(c)(1), it would have listed it with the other subsections listed. Indeed, Congress so demonstrated by adding subsection (a)(15) to § 523(c)(1) in 1994 and then deleting it in 1995. COLLIER ON BANKRUPTCY, ¶ 523.26[1], n. 1. Since § 523(a)(5) is not listed in § 523(c)(1), Smith’s claim based upon § 523(a)(5) was not discharged in Bunitsky’s 1991 bankruptcy, unlike the credit card debts which prompted him to file his 1991 petition. It thus follows that the 1994 stipulation and order, Plaintiff’s Ex. C, and Smith’s later action to enforce her alimony orders were not in void in violation of the 1991 discharge injunction<sup>14</sup>, as Bunitsky argues, because no determination under § 523(a)(5) had been made.

Rule 4007(a), F.R.B.P., authorizes a debtor or creditor to file a complaint to obtain a determination of dischargeability of debt. Rule 4007(b) provides that a “complaint other than under § 523(c) may be filed at any time.”<sup>15</sup> Thus Bunitsky at any time during or after his 1991

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<sup>14</sup>No evidence exists in the record showing that Bunitsky has, in this case or related to his 1991 Nevada bankruptcy, sought affirmative relief against Smith for violation of the discharge injunction.

<sup>15</sup>A complaint under § 523(c)(1) must be filed in accordance with the time limitation provided under Rule 4007(c), in a case under Chapters 7, 11 or 12.

bankruptcy was authorized to seek a determination of dischargeability of Smith's debt, but did not. Instead, the testimony shows that he continued to pay Smith alimony, at least sporadically, until he filed the instant Chapter 7 petition, and he represented that he would continue to pay her alimony and it would not be discharged.

Section 523(a)(5) was substantially rewritten<sup>16</sup> in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, § 211, most of which became effective 180 days after enactment on October 17, 2005. 4 COLLIER ON BANKRUPTCY, ¶ 523.11 (2005). Since Bunitsky filed his Chapter 7 petition on the day before the effective date, October 14, 2005, the prior version of § 523(a)(5) governs and it provides that a discharge "does not discharge an individual debtor from any debt –"

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(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance or support, unless such liability is actually in the nature of alimony, maintenance, or support.

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<sup>16</sup>The new § 523(a)(5) excepts from discharge debts for a "domestic support obligation", a new term defined at 11 U.S.C. § 101(14A). COLLIER explains that the new term "domestic support obligation" makes the scope of the new version of § 523(a)(5) more expansive than the type of debt covered under the prior version, which governs the instant case. COLLIER ON BANKRUPTCY, ¶ 523.11.

*In re Rostocki*, 18 Mont. B.R. 117, 123-24 (Bankr. D. Mont. 2000).

*Rostocki* stated the applicable standard for interpretation of § 523(a)(5):

A determination of what constitutes alimony, maintenance or support is determined under federal bankruptcy law, not state law. *Stout v. Prussel*, 691 F.2d 859, 861 (9<sup>th</sup> Cir. 1982); H.R. Rep. 595, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 77-79 (1978).

Section 523(a)(5)(B) “departs from the general policy of absolution, or ‘fresh start’, that is embodied in the Federal Bankruptcy Act. It embodies an overriding public policy favoring the enforcement of familial obligations.” *Shaver v. Shaver*, 736 F.2d 1314, 1315-16 (9<sup>th</sup> Cir. 1984). A Debtor’s interest in a “fresh start” is a matter of federal bankruptcy policy that Congress resolved in favor of Debtor’s spouses. *In re Harrell*, 754 F.2d 902, 906 (11<sup>th</sup> Cir. 1985).

Even though a divorce decree may label a finding as “property settlement”, a bankruptcy court may presume that the finding is intended for support when the circumstances indicate that the spouse receiving the payments needs support. *Stout*, 691 F.2d at 861. Bankruptcy Court’s must look beyond the language of the decree to the intent of the parties and to the substance of the obligation. *Shaver*, 736 F.2d at 1316.

*Rostocki*, 18 Mont. B.R. at 124, quoting *Wilson v. McCurdy, Wold & Fishcer (In re Wilson)*, 9 Mont. B.R. 509, 513-14 (Bankr. D. Mont. 1991). “When determining whether a particular debt is within the § 523(a)(5) exception to discharge, a court considers whether the debt is ‘actually in the nature of . . . support.’” *In re Chang*, 163 F.3d 1138, 1140 (9<sup>th</sup> Cir. 1998) (citing *Shaver*); *In re Douglas*, 330 B.R. 245, 248 (Bankr. S.D. Cal. 2005) (quoting *Chang*).

The crucial issue in deciding whether to characterize an award as maintenance or support is the function the award was intended to serve, which is a question of fact to be decided by the bankruptcy court. *Rostocki*, 18 Mont. B.R. at 124; *Hellwitz v. Black*, 11 Mont. B.R. 24, 34 (Bankr. D. Mont. 1992). Relevant factors in a court’s determination of whether “support is necessary include the presence of minor children and an imbalance in the relative income of the parties.” *Rostocki*, 18 Mont. B.R. at 124, quoting *Shaver*, 736 F.2d at 1316; *see also In re*

*Lightner*, 77 B.R. 274, 276 (Bankr. D. Mont. 1987) (“Evidence that payment of the debt is necessary for [the recipient] to maintain daily necessities such as food, housing and transportation indicates that the parties intended the debt to be in the nature of support.”).

Where, as in the instant case, parties negotiate a marital settlement agreement, the intent of the parties at the time the settlement agreement is executed is dispositive in determining whether a debtor’s obligation is in the nature of support. *In re Seixas*, 239 B.R. 398, 402 (9<sup>th</sup> Cir. BAP 1999); *In re Sternberg*, 85 F.3d 1400, 1405 (9<sup>th</sup> Cir. 1996), *overruled on other grounds In re Bammer*, 131 F.3d 788, 792 (9<sup>th</sup> Cir. 1997); *In re Austin*, 129 F.3d 124 (Table), 1997 WL 709350 \*2; *In re Combs*, 101 B.R. 609, 615 (9<sup>th</sup> Cir. BAP 1989) (“the court must ascertain the intention of the parties at the time they entered into their stipulation agreement”); *see also In re Sampson*, 997 F.2d 717, 723 (10<sup>th</sup> Cir. 1993) (“the critical inquiry is the shared intent of the parties at the time the obligation arose”).

Since the parties’ intent at the time they entered into Ex. B in 1990 is dispositive under the above authority, the Court rejects Bunitsky’s argument that Smith later remarried and another person replaced him to provide support for Smith. That argument not only flies in the face of well established case law governing when the parties’ intention is ascertained, but acceptance of that argument would provide encouragement and incentive for persons to fail to perform their obligations to pay alimony, support or maintenance required under marital settlement stipulations in the hope that later remarriage by the former spouse or other change in circumstances may relieve them of their legal obligations.

In 1990 Smith was disabled with lupus, and the parties had a disparity of income. Not only those factors but the parties settlement agreement, Ex. B, provides specifically for alimony



payments, which he failed to pay. Smith's later change of circumstances based on her remarriage are irrelevant to Bunitsky's obligation to pay her alimony under Ex. B until her remarriage. Ex. B specifically provides at the top of page 3 that "alimony shall cease and desist beginning the month in which said marriage takes place." The Court interprets this provision to relieve Bunitsky from alimony obligations from that point on, but the Court does not interpret this provision as working a forgiveness of his alimony obligations to Smith which had accrued up to the month of Smith's remarriage. Ex. B was drafted in Bunitsky's law office on his form. If Bunitsky wished for Smith's remarriage to terminate his unpaid alimony obligations which had accrued prior to the remarriage, then he should have negotiated and drafted Ex. B accordingly.

The evidence shows a contrary intent. Long after Ex. B was signed and Smith remarried Bunitsky repeatedly represented to her orally and in court filings that he owed her alimony, and continued to make alimony payments. Plaintiff's Ex. C and E include numerous admissions by Bunitsky and his attorney that he understands he owes Smith alimony as provided in Plaintiff's Ex. C. Bunitsky testified that he continued to make payments to Smith, which she corroborated in her testimony, up to the date of his 2005 bankruptcy filing. In Bunitsky's sworn Schedule J he states that he pays \$300 per month in alimony, maintenance or support.

Bunitsky's contention that his alimony obligation to Smith was discharged and/or satisfied, or property settlement is flatly contradicted by his own evidence, Ex. B, his sworn statements and Schedule I and his attorney's representations in Plaintiff's Ex. E, and several years conduct in making payments. Smith requests that the Court judicially estop Bunitsky from contending that his alimony obligation to Smith was satisfied. In light of the overwhelming evidence in the record of the parties' written intent and conduct, the Court deems application of

judicial estoppel unnecessary in this case. The Court finds Bunitsky was not a credible witness in his testimony denying that he owes Smith alimony arising from their divorce before her remarriage of his alimony obligation, or that his alimony obligation was satisfied. He offered no evidence to corroborate his denial, while Smith offered written evidence of the parties' intent, Smith's statements and conduct, which easily satisfy her burden of proof by a substantial preponderance of the evidence to except her claim from discharge under § 523(a)(5).

### **III. Attorney's Fees.**

Both sides submitted affidavits of attorney's fees and costs. Geranios' affidavit includes a billing statement itemizing his attorney fees totaling \$7,307.50 and costs in the amount of \$416.78. Murphy's affidavit includes a billing statement itemizing his attorney fees totaling \$3,712.51.

No general right to recover attorney's fees exists under the Bankruptcy Code. *In re Montgomery*, 310 B.R. 169, 184 (Bankr. C.D. Cal. 2004); *Renfrow v. Draper*, 232 F.3d 688, 693 (9th Cir.2000); *Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir.1997). The American Rule denies attorney's fees in the absence of contract, applicable statute, or other exceptional circumstances, and any exceptions to the American Rule are narrowly circumscribed. *In re Acequia, Inc.*, 34 F.3d 800, 819 (9<sup>th</sup> Cir. 1994) (quoting *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763, 765 (9<sup>th</sup> Cir. 1984)).

If a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceeding, attorney's fees are available, but only to the extent that they were incurred litigating the state law issues. *Montgomery*, 310 B.R. at 184; *Renfrow*, 232 F.3d at 694. In addition, a bankruptcy court is prohibited from awarding attorney's fees for

litigating federal law issues in bankruptcy court simply because state law may be "integral" to determining dischargeability. *Id.*; see *Baroff*, 105 F.3d at 442-43; *Am. Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1126-27 (9th Cir.1996). In *Montgomery*, the court denied a request for attorney's fees to the prevailing party who did not submit any evidence at trial identifying the legal services rendered in the action solely with respect to the litigation of state law issues, the amount of fees incurred by reason of such legal services, nor the reasonableness of such fees. 310 B.R. at 184.

The instant adversary complaint seeks an exception from discharge for alimony under § 523(a)(5). A determination of what constitutes alimony, maintenance or support is determined under federal bankruptcy law, not state law. *Stout v. Prussel*, 691 F.2d at 861; *Rostocki*, 18 Mont. B.R. at 124. In the Ninth Circuit courts consistently have refused to award fees when the substantive legal question was governed by federal bankruptcy law rather than basic contract enforcement questions, even when the underlying agreement contains an attorney fee provision enforceable under state law. *In re Deroche*, 434 F.3d 1188, 1191 (9<sup>th</sup> Cir. 2006), *petition for Cert. Filed* (May 9, 2006); *Fobian v. Western Farm Credit Bank*, 951 F.2d 1149, 1153 (9<sup>th</sup> Cir. 1991).

In the instant case Smith seeks an award of \$7,307.50 and costs in the amount of \$416.78 based upon the provision of their settlement agreement, Plaintiff's Ex. C, a provision substantially similar to the provision in *Montgomery*. As in *Montgomery*, Smith did not submit any evidence at trial identifying the legal services rendered in this action solely with respect to the litigation of state law issues, the amount of fees incurred by reason of such legal services, nor the reasonableness of such fees. No state law issues were actually litigated. The parties

stipulated to admission of all the exhibits. Based upon the longstanding rule in the Ninth Circuit set forth in *Deroche* and *Fobian*, based upon Smith's failure to submit evidence identifying the legal services rendered solely with respect to the litigation of state law issues, the Court must deny her request for attorney fees and costs. *Deroche*, 434 F.3d at 1191; *Fobian*, 951 F.2d at 1153; *Montgomery*, 310 B.R. at 184.

### **CONCLUSIONS OF LAW**

1. This Court has jurisdiction of this adversary proceeding under 11 U.S.C. § 1334.
2. This is a core proceeding to determine dischargeability of a debt under 28 U.S.C. § 157(b)(2)(I).
3. Plaintiff satisfied her burden of proof by an overwhelming preponderance of the evidence that the intent of the parties at the time they executed their marital settlement agreement was that the Defendant's obligation is in the nature of alimony, maintenance or support subject to exception from Defendant's discharge under 11 U.S.C. § 523(a)(5) in the unpaid amount of \$38,705.00.
4. Plaintiff's request for attorney's fees and costs is provided for under the parties' written agreement, Plaintiff's Ex. C; however the substantive legal question in this adversary proceeding was governed by federal bankruptcy law rather than basic contract enforcement questions, and therefore even though the underlying agreement contains an attorney fee provision enforceable under state law Smith's request for an award of attorney fees and costs as prevailing party must be denied. *In re Deroche*, 434 F.3d at 1191; *Fobian*, 951 F.2d at 1153.

**IT IS ORDERED** a separate Judgment shall be entered against the Defendant Victor N. Bunitsky in the amount of \$38,705.00, in favor of the Plaintiff Lynn Smith, and that obligation

imposed upon Victor N. Bunitsky in the dissolution of his marriage from the Plaintiff is excepted from the Defendant/Debtor Victor N. Bunitsky's discharge under 11 U.S.C. § 523(a)(5) as alimony, maintenance or support; and each party shall be responsible for his or her own attorney's fees incurred in this adversary proceeding.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER  
U.S. Bankruptcy Judge  
United States Bankruptcy Court  
District of Montana